

MID TERM ASSIGNMENT

Afghanistan Constitutions

1964 and 2004, A Comparison of Islamic Articles

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Afghan Constitutions of 1964 and 2004

Comparison on role of religion

Abstract. Ontological arguments on divinity are as old as the history of civilisations. Present day Afghanistan remained a geographical pivot of Islam at the dawn of last millennium. Constitutionalism and constitution dates back to Greeks and Aristotle, who studied over 150 constitutions. In modern era, almost every country has a constitution, this paper analyse the Afghanistan Constitutions of 1964 and 2004 in the theoretical framework of ancient Greece and political philosophers including Hobbs, Locke and Rousseau. Paper concludes with the argument, that there is no perfect constitution rather each country adopts it according to its own environment and that 2004 Afghanistan constitution is an idealistic approach to a country embedded in history and warfare.

Introduction

Constitutionalism is the idea that government should be limited through established procedures with people electing their representatives. Etymologically, constitution is a Latin word that represents 'constituitio' which means 'establishment' or 'ordinance' of the emperor. State is the basic brick of our modern political system, to Aristotle, state is a creation of the nature. Constitution is the legal framework of a nation, it specifies the power distribution among the various institutions of a state. Aristotle mentioned studying no less than 158 constitutions of the Greek city states, in which slaves were given freedom and rights. These are the very first mention of constitutions in history. There were laws in the history, like 'Hammurabi Laws' dating back to 700 B.C; or 'Moses Eleven Commandments' and even in India in ancient times the life was governed by the unwritten laws of Rig Veda, thus there were always a code and set of laws to govern the society, even among the tribes an unwritten code of life is present even today. Religion to a great extent acted as a constitution, in Islam the Holy Koran and Hadiths covers almost all aspect of daily and social life ranging from distribution of wealth on death to the eating taboos. In 14th Century, Tamerlane gave a very concise and precise set of rules for his empire which covered the succession, punishments, taxes, military organisation and so on.

Afghanistan a landlocked country with an area that equals to France, Holland, Belgium and Denmark combined, it has a population of 22 million in , which is 99% Muslim (90% Sunni, 10 % Shia) and 85% of this population lived in rural area having a literacy rate

of 10%, there are no railways in Afghanistan, 80% of area is mountainous, Afghanistan shares a 2,348 Kilometres of border with Central Asian Republics on west and north, 2,180 Kilometres with Pakistan on east, 820 kilometres with Iran in south and 73 Kilometres with China in north.¹ Afghanistan came into existence as a state in 1740 with Ahmed Shah Abdali laying the foundation of an empire that stretched from Delhi in east to Oxus in west. With the passage of time the Sikhs followed by British annexed and capture much of Afghan territory in east to an extent that in 1873 the Afghan borders were demarcated with Russia and in 1893 with India.²

The very first constitution in Afghanistan was adopted in 1923 by King Aman Ullah . In 1931, King Nadir Shah adopted a new constitution and this constitution lasted till 1964, one of the longest living constitution in the world, it lasted more than a decade in average life of a world's constitution. In 1964, a new constitution was passed by King Zahir Shah. In 1973, a military coup brought an end to monarchy in Afghanistan³ and thus in 1977 a new constitution was adopted; it was short lived as Russian invaded the country and resultantly a new constitution was passed in 1980. In 1987 a new constitution was approved by President Najeeb, he had to amend it in 1990. In 1995 a new constitution was adopted by the Taliban and finally in 2004 after the invasion of Afghanistan by USA a new constitution was passed which is still in vogue.⁴

Ontology of religion and politics

Egypt the cradle of civilisation about whom we have justified knowledge to believe, had their kings as the sole power , but kings powers were to a great extent were grounded in the assumption and perception as the image of the deity. The religious ceremonies were performed by the professionals ‘ each word and act had to be performed meticulously , any error and the entire ceremony had to be performed again’. Thus pharaohs were helped by the religious class, who in turn were exempted from taxes.⁵ This sets in pace the relationship between the kings and emperors who would succeed to the throne mainly by the sword , yet requiring the legality of divinity , endorsed by the preachers. After the revelations through Holy Scriptures from Moses to Christ to Muhammad (pbuh, last messenger) the historicism of civilisation in Europe, Africa and Asia is a history of clashes among these three religions. Roman Empire was founded in Rome in 700 BC and with the passage of time approached its zenith at the time of Christ and remained so when Islam emerged in 580- 640 AD. Roman Empire had a constitution, in which absolute power was not vested in Caesar but shared and

¹ Lester Grauand, Michael Gress ,eds, *The Soviet Afghan War, How a superpower fought and lost a war* (Kansas University press,2002),pp,1-5

² <https://www.washingtonpost.com/wp-srv/world/countries/afghanistan.html>

³ William Byrd, *Lessons from Afghanistan's history for the current transition and beyond*. United States Institute of Peace, Special Report No.314. September 2012. WWW.USIP.Org

⁴ Barnett Rubin, “Crafting a constitution for Afghanistan,” in *Journal of Democracy* Volume 15, Number 3, July 2004.

⁵ Jhon Shoup, *The Nile, an encyclopaedia of geography, history and culture*. (Colarado: ABC-Clio, 2017),pp.12-13. Also see Lionel Barnet *Hindu gods and heroes, studies in the history of the religion of India*. (London, 1888), pp,22-43.

supervised by the senators, after converting into Christianity the Caesar's political power was grounded in the church. 12 Tables remained as a source of Roman Law till Corpus Iuris Civilis in 540 CE.⁶ Roman political history is one of the earliest which revolves around tribes, as compared to Greek which is island bound. The Romans did have assemblies 'Concilium Plebis' which elected magistrates, the power of King was limited and was advised by the Curiae, an assembly of ten elders from each clan. Curiae also provided the military force in time of need.⁷

Roman and Greek empires do compel us to infer that, people created states and elected to run it through mutual consent and in this they form rules which later became the laws. However with passage of time, individual kings and clans as a law of human nature tried to preserve the power within their hands and resultantly revolutions and wars.⁸

Islam spread through Persia, present day Afghanistan and Amu Darya which Arabs called Marwaulnihar, mainly as a result of results on battlefields. In 750 AD, Arabs defeated Chinese and Turks at Battle of Yazman and from then onwards, Marwaulnihar became the centre of pivot for the spread of Islam. Mahmood Ghazna carried out several expeditions from Ghazna towards South India with Islam as the battle cry. A dynasty was established in India by the Ghazna and later Ghors; who ruled India in the name of religion. Mongols phenomena erupted in 1203 AD and soon devastated the entire Muslim civilisation; the only positive aspect of this dark era for Islam was the conversion of Mongols themselves into Islam. Institution of public participation for the election of the ruler or caliph in early days of Islam was never specified neither was it an interpretation of Holy Prophet (PBUH last messenger) words, actions and approvals recorded later in centuries as Hadiths. The caliphs selection and succession was through consultation among the elders and the blue blood line, elite tribal hierarchy was challenged by the new converts, who in many cases were not part of the tribe and yet had equal voting power. This institution of caliphate had its high point during the last of righteous caliph era; when he was confronted with a rebellion. The end of the confrontation left ever present scars and division of thought among the followers of Islam.⁹ Islam was divided in the legal interpretation of the Holy Laws, for instance the people who were adhering to the last Caliph (Hazrat Ali) legislation were and still known as Shias. The other are by and large known as Sunnis; the latter have three major philosophers (Imam) namely Imam Hanbal, Imam Shafi and Imam Hanafi. In present day Central Asia and Afghanistan, Hanafi interpretation is deep rooted.

Constitution and Constitutionalism

⁶ Matthew Bunson *Encyclopaedia of the Roman Empire* (New York: 2002), p 184.

⁷ Andre Lintott *The Constitution of the Roman Republic* (Oxford 1998), pp, 43-88. University Press,

⁸ David J. Bederman the Classical Constitution : "Roman Republican". *Southern California Interdisciplinary Law Journal* [Vol. 17:405] <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/17-3%20Bederman.pdf>

⁹ Burhan Al Marghianani *Al Hidayat fi Sharh Bidayat al Mubtadi*, translated into Persian in 1776 at Bengal, translated in English by Charles Hamilton, (Calcutta, 1874). One of the earliest legal book of Hanafi Muslim Laws.

Amir Timur or Tamerlane was the last of great classic conqueror, emperor and a symbol of terror. He rose from Ferghana Valley in present day Uzbekistan. His ontology was based upon Islam, he was an absolute ruler and yet he had placed the religious scholars as the closest among all his twelve categories of court protocol. Timur did not require any religious base for his rule or legality because he himself was symbol of the religion. Amir Timur in his *Tuzk*¹⁰ set forth the philosophy, theory and laws for ruling the empire and his philosophy rooted in the geography and history remained enforced in the region including Afghanistan (it was very much part of Tamerlane's kingdom) till 1923 when the very first constitution was adopted in Afghanistan by King Amanullah.

The major breakthrough in the millennium old clash among the people and the ruling elite came in England where in 1640s the public revolted against the monarchy and in the end the monarch agreed to participation of public in government affairs and also it curtailed powers of the monarch, Magna Carta is the unwritten constitution of England. This also agitated the minds of philosophers on the very nature of state, power, liberty, and state. Men like Jhon Locke, Rousseau, John Hobbs, Karl Marx, Hegel, Voltaire, Kant, Descartes, Montesquieu, Mill, Lenin to name some of the most influential philosophers. The issue and ideas were on the relationship between man and the state. To Locke, it was a social contract in which, free man has entered into, thereby surrendering a portion of his own sovereignty in order to ensure his security.¹¹ Hobbs had a different approach and favoured a state because it is natural and as such a man should be loyal to it. Marx viewed all this interaction of individual and state as a continuous struggle between rich and poor. French Revolution had an impact on then world politics and steps were taken by the elite to share the power with public and one easy step was to proclaim and adopt a constitution. A collection of all good worldly deeds, trumpeting the equality, economic prosperity, dignity and legality in state affairs. Thus Constitution creates the perception and set of laws as adopted by the public, whereas Constitutionalism is the analysis whether a state or the ruling class has actually accepted these and acted in letter and spirit.

From ancient era to American Constitution, the power was vested in the king and he was as a matter of fact the state. King had control over financial, legal, military and social affairs, his words were the laws. The American War of Independence in 1775 brought a paradigm shift in world politics. The American Constitution was adopted, it is very short and brief outlining the basic fundamentals of the nation; it was far from perfection as it mentioned only free white people and no mention of blacks and neither slavery was abolished. However, USA as a new world, did enshrined the fundamental right of freedom of an individual, allowing him to carry weapon and have a right to freedom of expression too.¹²

Afghanistan Constitutional History

¹⁰ Syed Abul Hashim Nadi *Tuzk Timuri* (Lahore; Sang Meel, 2012). It was translated from Persian into Urdu in 1963.

¹¹ Jhon Locke *Two treatise on Civil Government*.

¹² USA Constitution, <https://www.archives.gov/founding-docs/constitution-transcript>

Afghanistan was a monarchy at the turn of last century and remained so till 1973 , thus its first constitution of 1923 ,1933 and 1964 were all made and adopted with the king as the sovereign and having all the powers. Constitutions were thus nothing more than the rules for the running of the government. Despite this inherent flaw the fact remains that Afghanistan was among the exception among the Asian nations and particularly among the Islamic states which were few then, to have a constitution. Afghanistan by virtue of being an empire has a population which is ethnically and sectarian wise is divided having various languages among which Dari¹³ and Pashtu are most prominent.

Country itself is broadly divided into two main geographic blocks, the northern which extends north of Kabul and borders with present day Uzbekistan, Turkmenistan and Tajikistan (all were part of USSR till 1991). Pashtun belt extends east and south of Kabul. One very distinct feature of the Afghanistan is the tribal society that adheres to its tribal customs and laws. Women were never given the due respect in the running of official affairs and as per tradition, confined to the house and had to observe strict purdah.

In 1919, Afghanistan underwent a bloody coup in which King was murdered and also it attacked India. The war itself terminated in defeat of Afghanistan with a new treaty with British India. It was in this back ground that first and second constitutions were adopted. In 1933, King Zahir Shah took over and it was he, who introduced the 1964 Constitution. The political environment or paradigm at that era was anti-monarchy with kings in Egypt and Iraq being toppled by military. King Zahir did not introduced any drastic changes in the constitution, the constitution in vogue then , was formed by his father.

1964 Constitution

The Constitution ‘Assasi Qanoon’ was adopted on 1st October 1964¹⁴

In 1963, after over 30 years of relative stability and slow but steady economic and political progress, King Zahir (who had been on the throne for 30 years) called for the drafting of a new constitution. This constitution, which introduced a far greater degree of democratic participation, was drafted over an 18 month period after wide-ranging consultations with all sectors of society. The resulting constitution provided for a popularly elected parliament, elected city councils, provincial advisory councils, and an independent

¹³ Dari is a form of Persian language.

¹⁴ Assasi Qanoon, Constitution of Afghanistan.

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=afghanenglish> also see Constitutional History of Afghanistan, <https://constitutionnet.org/country/constitutional-history-afghanistan>

legislature. Once this constitution was ratified by a loya jirga in 1964, the era known as the “new democracy” period began.¹⁵

Looking in the past, at that particular period, the Islamic world was rather sublime in nature, hardly any Islamic country was independent , self reliant, imposing, they were not taken with much seriousness in western civilisation. Muslim countries were aligned with either of the poles, financially, institutionally, military dependent upon west and communist for survival in the international arena.

The Afghan Constitution of 1964 starts with the name of God (bismiallah) however other than this, there is no mention of religion in the preamble of the constitution. The preamble , stresses on the culture and history of Afghanistan and the vision to be progressive but there is no mention of word Islam. *TO reorganize the national life of Afghanistan according to the requirements of the time and on the basis of the realities of national history and culture;*

The very first article of the constitution which specifies the name of Afghanistan, its flag have no mention of Islam, Afghanistan was just Afghanistan and nothing specific in terms of political science. For instance neighbouring Pakistan was constitutionally Islamic Republic of Pakistan.¹⁶ however article 2 , stresses that Islam will be the official religion of country and religious rites will be performed according to Hanafi sect. Moreover in the same article non Muslims are given freedom to exercise their own rites.¹⁷

In Title 2, The King, the constitution stipulates vide Article 8, ‘ King shall be Afghan and Muslim and a follower of Hanafi doctrine’. In Article 11, the name of King to be read in Friday Khutba. This is historically and traditionally part of Islamic culture . Friday prayers are important in Islamic society as majority of the people do offer this once a weekly prayers in the mosque, where the Ulema (religious priest) first narrates Khutba, which is primarily the interpretation of the religion as per Ulema own limited knowledge. It provides legality from early days of Islam to the ruler whenever his name is read in Khutba. Article 15 of constitution deals with the oath of The King ‘that I shall protect the sacred principles of the religion of Islam.’ The Article 69, deals with law, and constitution accepts that in areas where no law (resolution passed by both houses and signed by King)exists , the Hanafi jurisprudence shall be considered a law.

Summary of 1964 Constitution. The constitution had a 128 Articles including three amendments and five transitional articles. However only two articles deals with the Islam and Hanafi. Thus it can be stated that 1964 Constitution did not relied upon religion. Muhammad the last prophet (pbuh) name was not mentioned even once in the entire constitution of 1964.

¹⁵ J. Alexander Their *The making of a constitution in Afghanistan* . Originally presented at State reconstruction and international engagement in Afghanistan, 30 May - 1 June 2003, London School of Economics and Political Science and University of Bonn. http://eprints.lse.ac.uk/28380/1/Thier_LSERO_version.pdf

¹⁶ Constitution of Pakistan. <https://nanopdf.com/queue/constitution-of-pakistan-of-1962->

¹⁷ Article No.2, Constitution of Afghanistan 1964.

2004 - Constitution of Afghanistan

At the turn of last millennium, Afghanistan legally was being ruled in a medieval manner, where the religious laws, doctrines, precedents and traditions were the legal documents of the society and state. For a society still immersed in the aftermath of two decade long civil war, war of independence from Russian military intervention; the existing legal pattern was absolutely justified. For the international community it was utterly unacceptable to have among them a nation still adhering to ancient and tribal way of life. Afghanistan was an anti-thesis of modern state hood. Religious persecution was a common way of life in Afghanistan, the thousand year's old Buddha statue at Bamian was demolished in February 2001 by Taliban, despite an outcry of international community.¹⁸

The after effects of 9/11 and the resultant invasion and operations by USA and NATO in Afghanistan toppled the Taliban and a new paradigm was constructed. The two decade long war had divided the Afghanistan into two ethnic, religious sect, geographically divided into North-South regions. Pashtuns in the south of Kabul had been in the forefront of Taliban regime and philosophy whereas the Northerners being Shia and Persian speaking. In December 2001, Bonn Agreement was reached for 'Arrangements in Afghanistan pending the re-establishment of permanent government institutions'.¹⁹ The constitution making process in Afghanistan at the turn of millennium is interesting and important for scholars as it is the making of a constitution for a historical nation, defeated , and by the victors.²⁰

The process itself in steps included, setting up of an interim government which will convene a Loya Jirga, the Jirga to elect the government which in turn will prepare a constitution within 18 months and after its approval by the Loya Jirga , a fresh election to be held after 24 months. 1964 Constitution was adopted to be in use till the new constitution is approved. Obviously Afghans were not free to prepare their own constitution, it was a blessing in disguise, as the issue which Afghans themselves were shy of addressing like national languages and role of regional languages and culture was made easy by the western scholars and occupying powers.

It was in a sense giving birth to a new Afghanistan; it also highlights how, constitutions are made in modern time.

Thesis of the new Afghanistan constitution is rooted in the historical fact that religion is still an important aspect of people as it was two millennium ago. In the western society, religion has been separated from politics but in Afghanistan it is still very much in force and this has been incorporated into the various articles of the constitution.

¹⁸ UN marks 10th anniversary of destruction of Buddha statues in Afghanistan. <https://news.un.org/en/story/2011/02/367782-un-marks-10th-anniversary-destruction-buddha-statues-afghanistan>.

¹⁹ International Crisis Group *Afghanistan's Flawed Constitutional Process* Report No.56, 13 June 2003.

<https://www.crisisgroup.org/asia/south-asia/afghanistan/afghanistans-flawed-constitutional-process>

²⁰ J. Alexander Their *The making of a constitution in Afghanistan*

Islamic features of Constitution

The constitution from the onset gives the perception of being an Islamic constitution. In the preamble '*In the name of Allah, the Most Beneficent, the Most Merciful, Praise be to Allah, the Cherisher and Sustainer of Worlds; and Praise and Peace be upon Mohammad, His Last Messenger and his disciples and followers...Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam...acknowledging Jihad,*'²¹

In very first Article (Article No.1) name of country is adopted as Islamic Republic and Islam as the state's religion. Article No.3 , states that no law in Afghanistan shall contravene the Islamic tenants and provisions. Article 17 stipulates the education including religious and upkeep of madrassah and mosques by the state. Source of calendar was rested upon the Islamic Hijrah in Article No.18. Flag of Afghanistan adopted the Kalma under Article No.19 and in Article No.20, National Anthem to have Allah O Akbar. Article No.45 mandates education of Shariia. Articles Nos. 62 and 63 deals with the compulsion of president being a Muslim and his oath contains a pledge to work in line with the religious edicts. In terms of jurisprudence Articles Nos 118 and 130 both compels the laws to be in line with Hanafi Jurisprudence and Supreme Court judges to be well educated in Islamic Jurisprudence.

Conclusion.

Constitutions are a reflection of the struggle of people to share the power, throughout history of mankind this struggle is an ongoing process. In Afghanistan, a landlocked, tribal society in a mountainous terrain with ethnic and linguistic divide, formation of a constitution is not easy task. In 1923 , the first constitution tried to westernise the country through change in culture and dress and it failed. In the 1964 Constitution, which was more or less in line with those times, religion was not given due importance.

In 2004, as the country had witnessed a savage civil war , resultantly foreign powers invaded and thus the 2004 Constitution is a more realistic realisation of religious power in the society.

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